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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

GERALD LESSERT, Special Administrator of the Estate of RICHARD CLAYMORE LESSERT, Deceased	)	Civ. Case No.: 17-5030
Plaintiff,	)	
v.	)	**COMPLAINT**
BNSF RAILWAY COMPANY, A Corporation	)	
Defendant.	)	

SERVE: BNSF Railway Company
C/O C.T. Corporation System
319 Coteau Street
Pierre, South Dakota 57501-3187

Plaintiff Gerald Lessert ("Plaintiff") is the Special Administrator of the estate of his deceased son, Richard Claymore Lessert, ("Mr. Lessert"). Plaintiff brings this cause of action against Defendant BNSF Railway Company ("Defendant") on behalf of the statutory beneficiaries who are Mr. Lessert's widow, Mrs. Vada Lessert, and her and Mr. Lessert's children, Cierra, Trinity, and Tyrell. In support of this action, Plaintiff states as follows:

1. The Plaintiff brings this action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq.* ("the FELA") for damages caused by the injury and death of Mr. Lessert. This Court has jurisdiction under 45 U.S.C. § 56 and 28 U.S.C. § 1331. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2).

2. The Plaintiff is and all times relevant to this action was a resident of Porcupine in Oglala Lakota County, South Dakota.

3. The beneficiaries of this action all are and at all times relevant to this action were residents of Black Hawk, South Dakota.

4. The Defendant is a corporation engaged in interstate commerce by railroad and operates a system of railways as a common public carrier of freight for hire between the various states of the United States. At all times relevant to this complaint, the Defendant has conducted business in the State of South Dakota and in this judicial district. The Defendant's registered agent for service of process is CT Corporation System; 319 Coteau Street; Pierre, South Dakota 57501-3187.

5. On January 17, 2017, Mr. Lessert was injured and killed while working on Defendant's main line track at or near Edgemont, South Dakota.

6. Mr. Lessert's widow and children are the proper beneficiaries of the FELA action. The action for injury to Mr. Lessert survives to his personal representative for the benefit of his widow and children under 45 U.S.C. §59.

7. At the time of Mr. Lessert's injury and death Mr. Lessert was working in Defendant's Maintenance of Way Department. This is the railroad department whose responsibility is the building, repair, and maintenance of Defendant's railroad track and track structures. Parts of Mr. Lessert's duties were in furtherance of interstate commerce and directly and substantially affected such commerce, and on January 17, 2017, Mr. Lessert was employed by and engaged with Defendant in interstate commerce.

8. On January 17, 2017 Mr. Lessert and two other Maintenance of Way employees, Mr. Dennis Schmitz and Mr. Stanley Mitchell, were required to clean snow and ice out of a switch located on Defendant's main line track at or near Edgemont, South Dakota.

9. The main line track on which Mr. Lessert was working ran next to and parallel to an adjacent main line track forming what is referred to on the railroad as a "double main" or "double main line." Where Mr. Lessert was killed this double main line runs in the compass direction north and south, and the switch where Mr. Lessert was required to clean snow and ice was on the east track. The switch was designed to allow trains to move to or from the east main line track onto another track that ran to the east. This track that ran off to the east from the east main line track was called the Deadwood Spur.

10. Mr. Lessert and the other members of the Maintenance of Way crew were assigned to clean the switch so that the switch could be used by an auto-rack train that was on the Deadwood Spur. The intention was for the auto-rack train to participate in a test or demonstration of certain train technology. The test or demonstration was being performed there by Defendant and GE Harris Company. In the performance of the test or demonstration, the auto-rack train was to be pulled from the Deadwood Spur, through the switch Mr. Lessert and his crew were assigned to clean, and onto the main line.

11. To clean the snow and ice out of the switch, Mr. Lessert was using a blower, referred to as a "jet pack," that Defendant has issued him. The jet pack was strapped to Mr. Lessert's back like a back pack. Mr. Lessert was wearing the other personal protective equipment required by Defendant's rules and practices, including hearing protection. As Mr. Lessert was performing this work, Defendant operated one of its freight trains southbound on the west main line track next to where Mr. Lessert was cleaning the switch. At the time of his death, the end of the southbound train on the adjacent, west main line track was passing Mr. Lessert. The last piece of equipment on this train was a running, locomotive engine referred to as a "pusher" because of its role pushing the train from the rear. The noise of the jet pack, the

hearing protection in his ears, and the noise of the locomotive engine passing him southbound on the adjacent track to the west all diminished Mr. Lessert's ability to hear as he focused on his assigned responsibilities cleaning snow and ice from the switch.

12. While he was focused on his duties cleaning the snow and ice out of the switch on the east main line Defendant operated a train toward him from south to north on the east main line. A left-hand curve in the track as the train operated from south to north toward Mr. Lessert and his crew, an overpass over the tracks on the north end of the curve, and the southbound train on the west main line, all combined to obstruct Mr. Lessert's and his crew's ability to see the train Defendant was operating toward him.

13. As the northbound train on the east track passed the switch, it barely missed Mr. Mitchell, struck and killed Mr. Schmitz, and struck and dragged Mr. Lessert under the train and killed him also. Damages for Mr. Lessert's injuries prior to his death are prosecuted by Plaintiff for the benefit of Mr. Lessert's statutory beneficiaries under 45 U.S.C. § 59.

14. Mr. Lessert's injuries and death occurred while acting within the course and scope of his employment.

15. Mr. Lessert's aforesaid injuries and death were directly caused, in whole or in part, by the negligence of the Defendant, including, without limitation, in the following respects, to-wit: Defendant negligently failed to furnish and provide plaintiff with a reasonably safe place to work, reasonably safe methods for work, reasonably safe conditions for work, and reasonably safe appliances for work in that:

a. Defendant negligently did not job brief and coordinate the work it assigned Mssrs. Lessert, Mitchell, and Schmitz with the work it assigned

Defendant's train crews operating Defendant's trains in the vicinity, on the same track, at the same time.

b. Defendant negligently did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew the means, methods, and procedures to job brief and coordinate for themselves their work with Defendant's train crews operating Defendant's trains in the vicinity, on the same track, at the same time.

c. Defendant negligently did not provide its train crews operating Defendant's trains in the vicinity where it assigned Mssrs. Lessert's, Mitchell's, and Schmitz's crew to work, the means, methods, and procedures to job brief and coordinate for themselves their work with that of Mssrs. Lessert's, Mitchell's, and Schmitz's crew

d. Defendant negligently did not inform and warn Mssrs. Lessert's, Mitchell's, and Schmitz's crew that Defendant was sending a train to pass through the location where Defendant assigned Mssrs. Lessert's, Mitchell's, and Schmitz's crew to work.

e. Defendant negligently did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew the means, methods, and procedures to inform themselves whether and when Defendant was sending train crews operating Defendant's trains in the vicinity, on the same track, at the same time Mssrs. Lessert's, Mitchell's, and Schmitz's crew was to perform its assigned switch cleaning work.

f. Defendant negligently did not inform and warn the train crew that struck Mssrs. Lessert and Schmitz that Defendant had assigned Mssrs. Lessert's, Mitchell's, and Schmitz's crew to work in the path of said train.

g. Defendant negligently did not provide the train crew that struck Mssrs. Lessert and Schmitz the means, methods, and procedures to inform themselves whether and when Defendant was sending Maintenance of Way crews, such as and including Mssrs. Lessert's, Mitchell's, and Schmitz's crew , to perform work on the tracks in the path of their train.

h. Defendant negligently did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew the means to communicate with the train crews Defendant sent to operate in the vicinity of the work Defendant assigned Mssrs. Lessert's, Mitchell's, and Schmitz's crew to perform, including but not limited to by failing to designate and publish appropriate radio channels and to require continuous monitoring for this purpose.

i. Defendant negligently did not provide the train crews Defendant sent to operate in the vicinity of the work Defendant assigned Mssrs. Lessert's, Mitchell's, and Schmitz's crew to perform the means to communicate with Mssrs. Lessert's, Mitchell's, and Schmitz's crew, including but not limited to by failing to designate and publish appropriate radio channels and to require continuous monitoring for this purpose.

j. Defendant negligently did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew a reasonably sufficient number of workers to enable the crew to establish reasonably adequate lookouts to enable the crew to learn of the approach of trains and to react in time for each member of the crew to get to a position of safety before being injured or killed.

k. Defendant negligently did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew equipment such as colored flags, colored paddles, distinctively colored vests, sound signaling devices, light devices, and other equipment reasonably necessary to allow lookouts to position themselves where necessary to become aware of approaching trains and to provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew reasonably adequate warning in time for them to get to a position of safety.

l. Defendant negligently did not provide Mssrs. Lessert, Mitchell, and Schmitz the information reasonably necessary for them to calculate, determine, and realize the time and distance they would need from the time and point a train is first seen by a lookout to the time it would take them to get to a position of safety.

m. Defendant negligently provided Mssrs. Lessert, Mitchell, and Schmitz information that misled them as to the time and distance they would need from the time and point a train is first seen by a lookout to the time they would need to get to a position of safety.

n. Defendant negligently caused, permitted, and allowed the lookout for Mssrs. Lessert's, Mitchell's, and Schmitz's crew to engage in activities other than the performance of lookout duties, and Defendant's lookout engaged in activities other than the performance of lookout duties.

o. Defendant, by and through its employee who was responsible for serving as the lookout for Mssrs. Lessert's, Mitchell's, and Schmitz's crew, negligently failed to provide reasonably adequate lookout for said crew.

p. Defendant negligently did not provide the crew of the train Defendant sent toward Mssrs. Lessert's, Mitchell's, and Schmitz's crew's work location reasonably adequate means to communicate with Mssrs. Lessert's, Mitchell's, and Schmitz's crew to provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew reasonably adequate notice or warning of the train's approach, including but not limited to by failing to designate and publish appropriate radio channels and the requirement of continuous monitoring for this purpose.

q. Defendant negligently caused, permitted, and allowed the train crew of the train it sent toward Mssrs. Lessert's, Mitchell's, and Schmitz's crew's work location to operate said train at an excessive and unreasonably unsafe speed for the conditions along the approach to the place where Mssrs. Lessert's, Mitchell's, and Schmitz's crew was assigned to work.

r. Defendant, by and through the crew of the train Defendant sent toward Mssrs. Lessert's, Mitchell's, and Schmitz's crew's work location, negligently failed to keep its train under sufficient control to stop before striking Mssrs. Lessert and Schmitz or to slow to provide these employees reasonably adequate warning in a reasonable amount of time before striking them.

s. Defendant negligently failed to promulgate, follow, and enforce reasonable rules, customs, practices, policies, and procedures to prevent, prohibit, proscribe, and protect employees from acts and omissions such as and including the foregoing.

t. Defendant negligently failed to reasonably train, educate, and instruct its employees in reasonable rules, customs, practices, policies, and procedures to prevent, prohibit, proscribe, and protect employees from acts and omissions such as and including the foregoing.

u. Defendant negligently failed to provide reasonably adequate and meaningful warning to its employees, including Mssrs. Lessert, Mitchell, and Schmitz, that:

i. Defendant was engaging in and committing the foregoing acts and omissions.

ii. Defendant was not promulgating, following, and enforcing reasonable rules, customs, practices, policies, and procedures to prevent, prohibit, proscribe, and protect employees from acts and omissions such as and including the foregoing.

iii. Defendant was not training, educating, and instructing its employees in reasonable rules, customs, practices, policies, and procedures to prevent, prohibit, proscribe, and protect employees from acts and omissions such as and including the foregoing.

16. Defendant knew, or in the exercise of ordinary care should have known, that in acting and failing to act as described above, it was reasonably likely that employees, including Mssrs. Lessert, Mitchell, and Schmitz, would be injured and or killed.

17. In addition to the foregoing acts and omissions of Defendant that constitute negligence, Defendant violated the Roadway Worker Protection (RWP) regulations, 49 C.F.R. § 214, by failing to properly train, educate, and instruct its employees, including Mssrs. Lessert, Mitchell, and Schmitz in the RWP regulations, and in failing to provide them the manpower, devices, and information necessary for Defendant's employees, including Mssrs. Lessert,

Mitchell, and Schmitz, to comply with the RWP regulations. Defendants acts and omissions that violate the RWP regulations include the following:

a. Defendant did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew a sufficient number of workers to enable the crew to establish adequate lookouts to enable the crew to learn of the approach of trains and to react in time for each member of the crew to get to a position of safety before being injured or killed.

b. Defendant did not provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew equipment such as colored flags, colored paddles, distinctively colored vests, sound signaling devices, light devices, and other equipment reasonably necessary to allow lookouts to position themselves where necessary to become aware of approaching trains and to provide Mssrs. Lessert's, Mitchell's, and Schmitz's crew adequate warning in time for them to get to a position of safety.

c. Defendant did not provide Mssrs. Lessert, Mitchell, and Schmitz the information reasonably necessary for them to calculate, determine, and realize the time and distance they would need from the time and point a train is first seen by a lookout to the time they can get to a position of safety.

d. Defendant provided Mssrs. Lessert, Mitchell, and Schmitz information that misled them as to the time and distance they would need from the time and point a train is first seen by a lookout to the time they could get to a position of safety.

e. Defendant caused, permitted, and allowed the lookout for Mssrs. Lessert's, Mitchell's, and Schmitz's crew to engage in activities other than the performance of lookout duties, and Defendant's lookout engaged in activities other than the performance of lookout duties.

18. In addition to the foregoing acts and omissions of Defendant that constitute negligence, Defendant violated 49 U.S.C. §§ 220.23 and 220.39 by failing to designate and publish an appropriate radio channel and by failing to require continuous monitoring of an appropriate radio channel that:

a. Mssrs. Lessert's, Mitchell's, and Schmitz's crew could use to job brief and coordinate their work at the location where they were assigned and where Defendant sent the train that struck Mssrs. Lessert and Schmitz.

b. The crew of the train Defendant sent toward Mssrs. Lessert's, Mitchell's, and Schmitz's work location could use to job brief and coordinate their work with that of Mssrs. Lessert's, Mitchell's, and Schmitz's crew.

c. The train crew Defendant sent toward Mssrs. Lessert's, Mitchell's, and Schmitz's work location could use to give Mssrs. Lessert, Mitchell, and Schmitz notice and warning of the train's approach to Mssrs. Lessert, Mitchell, and Schmitz.

19. The violation of Federal Regulations enacted for the purpose of the safety of railroad employees such as and including Mssrs. Lessert's, Mitchell's, and Schmitz's crew satisfies the negligence element of the FELA case and pursuant to 45 U.S.C. §§ 53 and 54a prohibits Defendant from charging Mr. Lessert with contributory negligence.

20. As a result of the above-described acts and omissions of the Defendant, and as a result of the violations of the aforesaid Federal Regulations, Mr. Lessert was dragged under the striking locomotive and suffered severe orthopedic and internal injuries. His body was crushed and torn by its impact with the locomotive, its wheels and other protuberances and the railroad ballast, ties, and rail. During the period before his death, Mr. Lessert was awake, conscious, and

fully aware of what was happening to him. During this time, he suffered extreme, conscious, physical pain and suffering and mental anguish.

21. Prior to his injuries and death, Mr. Lessert was a strong, able-bodied man capable of earning and actually earning in excess of $7,000 per month, plus fringe benefits. At the time of his injuries and death, his wife and children were dependent upon Mr. Lessert and received monetary support and other pecuniary benefit from Mr. Lessert including services, care, attention, instruction, training and guidance. Prior to his injury and death Mr. Lessert also performed a variety of household services from which his wife and children directly benefited. As a result of Mr. Lessert's death, his widow and surviving children have suffered substantial pecuniary loss.

WHEREFORE, Plaintiff prays judgment against Defendant for damages that are fair and reasonable and in an amount in excess of $75,000, for costs incurred herein, for post-judgment interest, and for any and all other relief to which plaintiff is entitled.

Jury Trial Demand

22. Under Federal Rule of Civil Procedure 38, Plaintiff demands a trial by jury.

Dated this 17th day of April, 2017

Respectfully submitted,

Charles Abourezk,
ABOUREZK LAW FIRM
P.O. Box 9460
Rapid City, South Dakota 57709-9460
Telephone: 605.342.0097
Facsimile: 605.342.5170
E-mail: cabourezk@azlaw.pro

And

Christopher H. Leach, MO #34147
HUBBELL LAW FIRM, LLC
1100 Main Street, Suite 2930
Kansas City, MO 64105
Telephone: 816.221.5666
Facsimile: 816.221.5259
E-mail: cleach@hubbellfirm.com

And

Scott S. Bethune, MO #35685
Wes Shumate, MO #60396
DAVIS, BETHUNE & JONES, LLC
1100 Main Street, Suite 2930
Kansas City, MO 64105
Telephone: 816.421.1600
Facsimile: 816.472.5972
E-mail: sbethune@dbjlaw.net
wshumate@dbjlaw.net

ATTORNEYS FOR PLAINTIFF